Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

RUETH DEVELOPMENT COMPANY and
HAROLD G. RUETH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a consent decree with a federal agency can ever be modified after a significant change in the law makes evident that the consent decree was void *ab initio* because the agency lacked the authority to enter into or enforce the decree.

2. Whether the Seventh Circuit erred in concluding that Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a), permits the government to regulate wetlands that "are *not* adjacent to open water" in contravention of this Court's decision in *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 168 (2001).

STATEMENT PURSUANT TO RULE 29.6

Petitioner Rueth Development Company states that it is not a corporation. It is a limited partnership, consisting of individual general and limited partners. Petitioner Harold Rueth is an individual residing in Indiana.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's opinion granting Respondent's Motion to Enforce Consent Decree and denying, among other things, Petitioners' Petition for Modification of Consent Decree is published at 189 F. Supp.2d 874 (N.D. Ind. 2001). *See* Appendix ("Pet. App.") 41a-59a. The district court's subsequent opinion vacating part of that opinion but denying Petitioners' motion for reconsideration is published at 189 F. Supp.2d 874 at 883 (N.D. Ind. 2002). *Id.* at 18a-40a. The Seventh Circuit's opinion (per Flaum, C.J., joined by Posner and Kanne, JJ.) is published at 335 F.3d 598 (7th Cir. 2003). *Id.* at 1a-17a.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on July 10, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant sections of the Clean Water Act, 33 U.S.C. §§ 1311, 1344, and 1362 are set forth at Pet. App. 87a-89a.

STATEMENT

For federal agencies bringing enforcement actions, "consent decrees have become widely used as devices to facilitate settlement." *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 524 n.13 (1986). In fact, "the vast majority of all administrative enforcement proceedings result in settlements . . . . [which] often lead to the entry of judgment by a court in the form of a consent decree." Lars Noah, *Administrative Arm-Twisting In The Shadow of Congressional Delegations of Authority*, 1997 WISC. L. REV. 873, 891 (1997).

The dual nature of consent decrees — which are both contracts and judgments — has spawned frequent litigation in the lower courts and required repeated guidance from this Court.

This case asks two questions of nationwide importance arising from the continued confusion over the nature of consent decrees in the environmental law context: *First*, can a party that entered into a consent decree with the federal government[1] *ever* modify that consent decree under Fed. R. Civ. P. 60(b)(5) after a decision of this Court significantly changes the law to make clear that the federal agency lacked the regulatory jurisdiction to enter originally into or continue to enforce the consent decree? *Second*, does this Court's recent decision in *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), mean that the federal government may not assert jurisdiction under Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a) ("CWA"), over wetlands that "are *not* adjacent to open water," thus establishing a "new jurisdictional line" that limits the federal government's authority? *SWANCC*, 531 U.S. at 168 (majority opinion); *id.* at 176 (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.).

On the first question, this Court has stated repeatedly that consent decrees, like other judgments, may be modified pursuant to Rule 60(b)(5) in appropriate circumstances, such as when the decree is premised on a "misunderstanding of the governing law," or "when the statutory or decisional law has changed to make legal what the decree was designed to prevent."

---

1. In this case, the Consent Decree was entered by the Environmental Protection Agency ("EPA") on behalf of the United States. The Army Corps of Engineers ("ACOE") has the authority to regulate discharges into "waters of the United States," 33 U.S.C. § 1344(a), while the EPA shares concurrent jurisdiction over those waters and has the responsibility to bring enforcement actions on behalf of the ACOE. *Id.*, § 1319(b). They are referred to collectively here simply as the federal government.

Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 390, 388 (1992); *see also Agostini v. Felton*, 521 U.S. 203 (1997); *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961). The Seventh Circuit ignored this avenue for Petitioners. While noting that the law governing the breadth of the government's jurisdiction and therefore the Consent Decree here "is obviously no longer accurate after *SWANCC*," Pet. App. 12a, the court said it "fail[ed] to see how it has any effect on the validity of the decree." *Id.* The court concluded that permitting modification of the Consent Decree would give Petitioners an impermissible "free ride on the defendants' success in *SWANCC*." *Id.* The Seventh Circuit concluded, contrary to the text of the rule and this Court's decisions in *Rufo*, *Agostini*, and *System Federation No. 91*, that parties can not have consent decrees modified even if the governing law has changed such that the agency had no authority to enter the decree in the first place.

As for the second question, despite the recency of *SWANCC*, appellate courts already conflict and a number of them have already ignored or sidestepped this Court's pronouncement that "the text of [CWA § 404(a)] does not allow" the federal government to assert jurisdiction over waters that "are *not* adjacent to open water." *SWANCC*, 531 U.S. at 168. While the Fifth Circuit has adhered to *SWANCC*, a growing number of appellate courts, including the Seventh Circuit here, have refused to view *SWANCC* as a significant limitation on the government's regulatory authority under the CWA. *See* Robin K. Craig, *Beyond SWANCC: The New Federalism and Clean Water Act Jurisdiction*, 33 ENVTL. L. 113, 115 (2003) ("for the most part, post-*SWANCC* federal courts have been less interested in adopting the *SWANCC* Court's emphasis on the role of federalism in interpreting the CWA than they have been in limiting *SWANCC* itself.").

The Seventh Circuit's departure from this Court's precedents on these two important federal questions, along with

the growing number of other cases that do as well, merits this Court's attention.

This case traces its origin to 1991 when the Environmental Protection Agency ("EPA") issued an Administrative Compliance Order against Rueth Development Company ("RDC"), asserting that RDC had illegally discharged fill material into a wetland located in the Castlewood subdivision in Dyer, Indiana in violation of CWA § 404(a). The EPA asserted in its order that the subject wetland was "adjacent to an unnamed tributary to Dyer Ditch, which flows north to Hart Ditch, which flows north to the Little Calumet River, which is a navigable water of the United States." Pet. App. 2a. RDC ultimately filed a complaint in federal court, arguing that the wetland in the Castlewood subdivision was isolated and thus beyond the government's regulatory jurisdiction under the CWA. The Seventh Circuit affirmed the dismissal of RDC's complaint because the Administrative Compliance Order was a nonreviewable preenforcement action. *Rueth v. EPA*, 13 F.3d 227, 230 (7th Cir. 1993) ("*Rueth I*"); Pet. App. 3a. In doing so, however, the Seventh Circuit made clear that under existing precedent "nearly all wetlands fall within the jurisdiction of the CWA since one test for whether the wetland affects interstate commerce is whether migratory birds use the wetland." *Rueth I*, 7 F.3d at 231 (citing *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256 (7th Cir. 1993)). The court then stated in no uncertain terms that the CWA was "as far-reaching as the Commerce Clause permits" and the court was "of the opinion that the wetland at issue falls under the broad definition of 'waters of the United States' in *Hoffman Homes*." *Id.*

Thereafter, in November, 1996, the United States brought an enforcement action alleging that RDC and Harold Rueth, one of RDC's individual general partners ("Petitioners"), violated CWA § 404(a), 33 U.S.C. § 1344(a), by filling the wetland without first obtaining a permit and failing to comply with the Administrative Compliance Order. Pet. App. 4a-5a.

Petitioners disputed that the government had authority to regulate the subject wetland because it was purely intrastate and isolated and therefore not a "water of the United States." Nonetheless, given the Seventh Circuit's position in *Hoffman Homes* and the clear warning to Petitioners in *Rueth I* that even isolated wetlands could be regulated under the CWA, Petitioners decided to enter into a Consent Decree with the government. The district court entered the Consent Decree on January 26, 1999. Pet. App. 5a.

Importantly, the Consent Decree contained no admission, stipulation or finding that: (1) the government had regulatory jurisdiction over the subject wetland, (2) the wetland was "adjacent" to navigable water, or (3) the wetland was otherwise part of the "navigable waters" that comprise the "waters of the United States." 33 U.S.C. § 1362(7); 33 C.F.R. § 328.3(a). In the Consent Decree, the parties agreed that Petitioners did not admit that they had committed the violations of the CWA as set forth in the Complaint, and Petitioners specifically denied that they had unlawfully dredged or filled wetlands that were subject to federal regulation. Pet. App. 61a. Petitioners did not waive their rights to reopen, modify, or set aside the Consent Decree in the future, and the parties agreed that they each reserved whatever legal and equitable remedies they had to construe, effectuate, or enforce the Consent Decree. Pet. App. 83a. The Decree required Petitioners to pay a $23,500 penalty and restore a three acre wetland on RDC's property (Wetland Section 6). After Petitioners were unable to meet various interim deadlines set forth in the Consent Decree, in November of 2000, the government moved to enforce the Consent Decree, seeking over $6,750,000 in penalties. *Id.*

On January 9, 2001, this Court decided *SWANCC*, which held that the government's authority to regulate "waters of the United States" pursuant to CWA § 404(a) arises from its traditional authority to regulate navigation; therefore the government's attempt to regulate non-navigable, intrastate,

isolated ponds in which migratory birds occasionally alighted exceeded the scope of its authority under the CWA. 531 U.S. at 167-68. Because "when this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law," *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313, n.12 (1994), the *SWANCC* decision meant that the government never had the authority to enter into the Consent Decree with Petitioners — which, as demonstrated below, governed an isolated wetland — and certainly had no authority to continue to enforce the Consent Decree.

Two weeks later, Petitioners apprised the district court of the *SWANCC* decision, and one week thereafter, filed a Petition for Modification of Consent Decree pursuant to Fed. R. Civ. P. 60(b). Petitioners asserted that, under *SWANCC*, the United States lacked jurisdiction to regulate an isolated wetland such as the Castlewood Site under the CWA, both when it signed the Consent Decree and subsequently when it sought to enforce the Consent Decree, particularly when the agreement contained no admission that the wetlands were "waters of the United States." Petitioners made the common-sense argument that a contract entered by one who lacks authority is *ultra vires* and therefore void *ab initio*, even if the contract is a consent decree entered by a governmental entity. *See, e.g., Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947) (FCIC insurance policy was void *ab initio* because FCIC lacked authority to issue policy). In support of their petition, Petitioners submitted an expert affidavit testifying that Wetland Section 6 was "an isolated, intrastate wetland." Their Petition sought to modify the Consent Decree pursuant to Rule 60(b) and prohibit the government from seeking to enforce the Consent Decree.

Eight months after Petitioners submitted their Rule 60(b) motion to modify the Consent Decree, the district court entered judgment in favor of the United States without a hearing, enforcing the Consent Decree and imposing $4,018,500.00 in

penalties payable jointly and severally by Petitioners — roughly their combined net worth. Pet. App. 41a-59a. In its Order, the court asserted that "the government seeks to regulate the Site on the theory that it is an 'adjacent wetland.'" *Id.* 45a. Then, for the first time, the district court found — without any evidence in the record to support its conclusion — that the wetland on the Castlewood Site was an "adjacent wetland," not an isolated wetland. According to the court, the wetland is subject to regulation by the United States because "[a] drop of rainwater landing in the Site is certain to intermingle with water from the Little Calumet River." *Id.* 46a.

On October 11, 2001, Petitioners moved to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). They pointed out that the district court reached its conclusion that Wetland Section 6 was an "adjacent" wetland by relying on an exhibit the government submitted that discussed a *completely different wetland* than the one at issue. Petitioners demonstrated that the only evidence in the record clearly demonstrated that the wetland at issue (Wetland Section 6) is an isolated wetland with no hydrological connection to "waters of the United States." Petitioners again argued that the Consent Decree should be vacated or modified because the government never had the authority to enter into or enforce the Consent Decree regulating this isolated wetland.

On February 21, 2002, the district court vacated its finding that the wetland at issue was an "adjacent wetland" but otherwise denied Petitioners' Rule 59(e) motion. Pet. App. 18a-40a. Instead, the district court changed its approach and *presumed that the Castlewood Site wetland is isolated* (*i.e.*, it does not connect to and is not adjacent to "waters of the United States"). *Id.* 27a.

Despite the court's correct assumption that the wetland is isolated, the Court upheld its award imposing $4,018,500 in penalties on the grounds that the act of entering into the Consent Decree forever precluded Petitioners from later having the decree

modified based on the government's lack of regulatory jurisdiction. *Id.* 34a-36a. In essence, the court ignored Rule 60(b)(5) and reasoned that, because Petitioners entered into the Consent Decree, they are *per se* barred from having the Consent Decree modified even assuming the Consent Decree was void *ab initio* and the government originally had no authority to enter into the Consent Decree. *Id.* 35a-36a.

The Seventh Circuit affirmed. Pet. App. 1a-17a. Like the district court, the appellate court reasoned that entering into the Consent Decree sets up a *per se* bar that forever precludes Petitioners from having the decree modified pursuant to Rule 60(b)(5) when it becomes evident that the decree is premised on a "misunderstanding of the governing law" or "when the statutory or decisional law has changed to make legal what the decree was designed to prevent." *Rufo*, 502 U.S. at 390, 388. While acknowledging that the law in the Seventh Circuit when the Consent Decree was entered "is obviously no longer accurate after *SWANCC*," Pet. App. 12a, the court stated that it "fail[ed] to see how it has any effect on the validity of the decree." *Id.*

The court acknowledged that the district court enforced the Consent Decree despite its assumption "that the wetlands are isolated and not adjacent." Pet. App. 10a. However, the court then proceeded to ignore this, and even went so far as to speculate that perhaps the wetland was adjacent, contrary to both the district court's decision and the only evidence in the record. *Id.* 10a-11a.

Despite the fact that the case came to the Seventh Circuit under the presumption that the wetland is isolated, and despite the fact that *SWANCC* makes regulation of such wetlands beyond the government's jurisdiction, the Seventh Circuit concluded that to permit Petitioners to have the Consent Decree modified would be an impermissible "free ride on the defendants' success in *SWANCC*." *Id.* According to the court, the fact that the parties did not agree to (and the government never demonstrated) a

basis for the government's jurisdiction is irrelevant. Pet. App. 13a. Allowing Petitioners to attempt to modify the decree because the government had no basis under the CWA to enforce the Consent Decree (or to have entered it) would "render the consent decree worthless." Pet. App. 14a.

The practical effect of this decision is to permit the government to continue to enforce a Consent Decree and regulate a wholly intrastate, hydrologically isolated wetland after *SWANCC* has demonstrated that the government has no authority to do so. This conflicts sharply with Fifth Circuit's conclusion that, after *SWANCC*, isolated wetlands are beyond the government's jurisdiction under the CWA. *See Rice v. Harken Exploration Co.*, 250 F.3d 264, 265 (5th Cir. 2001) ("a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water."). It also conflicts with the Fourth Circuit's decision in *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997), which struck down the government's jurisdiction over isolated wetlands even before *SWANCC*. However, the Seventh Circuit's decision joins a growing body of appellate court cases in which *SWANCC* has been read, despite its clear language, to permit the government's jurisdiction to extend to wetlands that "are *not* adjacent to open water."

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

This case satisfies multiple criteria for Supreme Court review. First, the decision below conflicts with this Court's caselaw, including *Agostini*, *Rufo*, and *System Federation No. 91*, which permits modification of judgments, including consent decrees, under Rule 60(b)(5) when there has been a "misunderstanding of the governing law" or "when the statutory or decisional law has changed to make legal what the decree was designed to prevent." *Rufo*, 502 U.S. at 390, 388. Second, the decision below, along with a growing body of other appellate

cases, conflicts with both this Court's *SWANCC* decision and the Fifth Circuit's conclusion that, after *SWANCC*, "a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water." *Rice*, 250 F.3d at 265. The *SWANCC* decision has quickly led to substantial confusion among the lower courts and even the regulatory agencies themselves as to the limits of the federal government's authority to regulate "waters of the United States." This Court's guidance therefore is needed again.

The questions presented not only are of great importance, they are likely to recur frequently because the government resolves the vast majority of its Clean Water Act enforcement actions via consent decrees. Moreover, the issue of whether a consent decree with a federal agency can be modified following a subsequent decision from this Court that the agency lacks regulatory jurisdiction over the subject matter of the consent decree has far-reaching repercussions for any and all regulatory agencies that employ consent decrees to resolve their enforcement actions as well as their regulated entities. This petition should therefore be granted.

I. The Decision Below Conflicts With Established Rule 60(b)(5) Jurisprudence As Applied to Consent Decrees.

This Court has explained that "consent decrees 'have attributes both of contracts and of judicial decrees,'" giving them a "dual character that has resulted in different treatment for different purposes." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986) (quoting *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975)). That duality has led to confusion over when to treat a consent decree as one or the other or both.[2] Whether parties can

2. The court below diverged from proper canons of consent decree construction on a number of levels. *Compare United States v. Armour &* (Cont'd)

have a consent decree with the government modified, as if it were any other kind of judgment, when "it is no longer equitable that the judgment should have prospective application," Fed. R. Civ. P. 60(b)(5), because the federal agency never had authority to enter into the consent decree is a question that remains to be answered by this Court.

A. The Seventh Circuit's Decision Conflicts With This Court's Established Precedent Permitting Modification of Consent Decrees

The Seventh Circuit in this case concluded that Petitioners' "consent" in entering into the Consent Decree forecloses their ability under Rule 60(b)(5) from having the Consent Decree itself modified. Pet. App. 11a. This logic simply cannot be true because, if it were, there would be no cases in which Rule 60(b)(5) applied to consent decrees. Of course, this is not the case. "There is no suggestion in [this Court's cases] that a consent decree is not subject to Rule 60(b)." *Rufo*, 502 U.S. at 378.

This Court has stated that "a consent decree or order is to be construed for enforcement purposes basically as a contract." *ITT Continental Baking Co.*, 420 U.S. at 238; *see also Ahern v. Board of Education*, 133 F.3d 975, 981 (7th Cir. 1998) ("Although consent decrees have the force of a court order, they are also a form of contract to be construed according to basic principles of contract interpretation."). Consent decrees must be governed by contract law because "it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all." *Local Number 93*, 478 U.S. at 522.

(Cont'd)

Co., 402 U.S. 673, 682 (1971) ("the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.") *with* Pet. App. 15a (stating that "we must 'look at the evil which the decree was designed to rectify.'").

Under traditional methods of contract interpretation, a contract entered by one without authority is *ultra vires* and therefore void *ab initio*, even when the party without authority is the government. *See, e.g.*, *Merrill*, 332 U.S. at 385 (FCIC insurance policy was void *ab initio* because FCIC lacked authority to issue policy); *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 671, 681 (1869) (without proper statutory authority, contract between Secretary of War and merchant was void because "the secretary was acting wholly beyond the scope of his authority"); *United States v. Amdahl Corp.*, 786 F.2d 387, 392-93 (Fed. Cir. 1986) ("[a]dministrative actions taken in violation of statutory authorization or requirement are of no effect. . . . The courts are bound to strike down illegal contracts."); 12 WILLISTON ON CONTRACTS § 35:63 (4th ed. 1999) (summarizing general rule that *ultra vires* contracts by governments are void).

Indeed, nowhere should this maxim apply with more force than where a regulatory agency, which is purely a creature of statute, is involved. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("[N]o matter how 'important, conspicuous, and controversial' the issue . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power . . . is limited to the authority delegated by Congress.").

The Court has applied this hornbook rule even in consent decree cases involving the government. For example, in *United States v. Beebe*, 180 U.S. 343 (1901), a government prosecutor entered into a consent judgment with two sureties in which the government agreed to dismiss claims for monies owed in return for each defendant paying $100. Years after the court entered the consent judgment, the government sought to void it because the prosecutor lacked the authority under federal law to enter into a compromise judgment without the consent of the Solicitor

of the Treasury. *Id.* at 351. This Court agreed, vacating the judgment and returning the parties to the *status quo ante* because "[a] judgment entered upon such a compromise is subject to be set aside on the ground of the lack of authority in the attorney to make the compromise upon which the judgment rests." *Id.* at 352.

The government's authority to enter into a consent decree is always subject to these limitations. *SWANCC*, as discussed *infra*, established that the "text of the statute does not allow" the government to assert jurisdiction over waters that "are *not* adjacent to open water." *SWANCC*, 531 U.S. at 168. This limit on the government's jurisdiction under CWA § 404(a) means that it had no authority to enforce the Consent Decree or enter into it in the first instance. The Consent Decree was void *ab initio*.

In this type of circumstance, where there has been "a significant change either in factual conditions or in law," *Rufo*, 502 U.S. at 384, this Court has stated that modification of a consent decree, like any other type of judgment, is appropriate. *See id.* at 388 ("modification of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent."). *See also System Federation No. 91*, 364 U.S. at 651 (consent decree is "not an abandonment of the right to exact revision in the future if revision should become necessary in adaptation to events to be.").

While a decision that simply "clarifies the law will not, in and of itself, provide a basis for modifying a decree," even that lesser circumstance "could constitute a change in circumstances that would support modification if the parties had based their agreement on a misunderstanding of the governing law." *Rufo*, 502 U.S. at 390; *see also System Federation No. 91*, 364 U.S. at 650 n.6 ("There are many cases where a mere change in decisional law has been held to justify modification of an outstanding injunction."). In fact, "[a] court errs when it refuses

to modify an injunction or consent decree in light of such changes." *Agostini v. Felton*, 521 U.S. 203, 214 (1997).

When a change in the law alters the breadth of a statute's reach, it is particularly appropriate to modify a consent decree impacted by that statute. For example, in *System Federation No. 91*, when the Railway Labor Act prohibited union-shop agreements between railroads and labor unions, nonunion railroad employees brought suit against the railroad and certain unions which resulted in a consent decree forbidding the defendants from discriminating against workers who refused to join unions. 364 U.S. at 644. When the statute was later amended to permit union-shop agreements between railroads and unions, the unions moved under Rule 60(b)(5) to have the decree modified to allow the unions and railroads to enter such agreements. *Id.* at 645. This Court held that it was an abuse of discretion to refuse to modify the consent decree because the change in the law had made lawful what was previously prohibited. *Id.* at 651-52. This Court reasoned that a court "must be free to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives." *Id.* at 651.

That the judgment arose from a consent decree and not litigation does not matter. According to this Court, "[t]he result is all one whether the decree has been entered after litigation or by consent." *Id.* at 651 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932)). A party "ha[s] no power to require of the court continuing enforcement of rights the statute no longer gives." *Id.* at 652.

This Court has made clear repeatedly that when the law changes such that a consent decree's terms conflict with the governing statute, the decree should be modified. *See, e.g., Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576 n.9 (1984) ("when a change in the law brought the terms of the decree into conflict with the statute pursuant to which the decree was entered, the decree should be modified

over the objections of one of the parties bound by the decree.") (emphasis added); *Local Number 93*, 478 U.S. at 526 (parties to a consent decree may not "agree to take action that conflicts with or violates the statute upon which the complaint was based."). In fact, while courts often have discretion to modify consent decrees, when a decree is based on an erroneous view of the law, it must be modified. *See Agostini*, 521 U.S. at 238 ("the exercise of discretion cannot be permitted to stand if [the court] find[s] it rests upon a legal principle that can no longer be sustained.").

Despite this Court's repeated pronouncements and despite acknowledging that the law governing the breadth of the government's jurisdiction and therefore the Consent Decree was "obviously no longer accurate after *SWANCC*," Pet. App. 12a, the court said it "fail[ed] to see how it has any effect on the validity of the decree." *Id.* Petitioners believe it is self-evident.

Though Petitioners never agreed that the wetland at issue was "adjacent" or otherwise part of the "waters of the United States," and never agreed to waive the right to contest the government's jurisdiction in the future, the court concluded that Petitioners' act of entering into the Consent Decree was sufficient by itself to compel adherence to the Decree. Though the district court enforced the Consent Decree based on the premise that the wetland was isolated which, according to *SWANCC*, "the text of the statute does not allow," *SWANCC*, 531 U.S. at 168, the Seventh Circuit concluded that Petitioners' consent to the decree obviated their right to have the Consent Decree modified after *SWANCC* changed the governing law. According to the court, Petitioners' decision to enter into the decree rather than litigate forever foreclosed their right to raise this issue after this Court changed the governing law. The Seventh Circuit's estoppel theory thus writes Rule 60(b)(5) out of the Federal Rules of Civil Procedure for *all* settlements. Because the Seventh Circuit's position conflicts sharply with this Court's opinions on the modification of consent decrees, the petition for certiorari

should be granted and the Seventh Circuit's decision should be reversed.

B. The Decision Conflicts With Other Decisions Regarding the Availability of Post-Consent Judgment Relief

The Seventh Circuit's position that Petitioners' agreement to the Consent Decree prohibited them from having the decree modified later based on a subsequent change in the law also diverges from the law dealing with other types of consent judgments. Perhaps the cases most analytically similar to Petitioners' situation are those in which criminal defendants have had their sentences vacated after a subsequent decision from this Court establishes that the activity for which they were convicted was not criminal. This has occurred after both trials and guilty pleas in which a defendant agrees to both the elements of an offense and even the imposition of a sentence. *See, e.g., Stanback v. United States*, 113 F.3d 651, 654 (7th Cir. 1997) (vacating conviction and sentence after a guilty plea where underlying facts no longer were considered a crime); *United States v. Loschiavo*, 531 F.2d 659, 667 (2nd Cir. 1976) (trial).[3] As one court has stated, a judgment pursuant to a plea

3. Courts have frequently vacated guilty pleas (or at least acknowledged the ability to do so) through the writ of coram nobis (Rule 60(b)'s criminal counterpart) based on a subsequent decision by this Court. *See, e.g., United States v. Lewis*, 478 F.2d 835, 836 (5th Cir. 1973) (vacating plea-conviction due to subsequent decision by this Court); *DeCecco v. United States*, 485 F.2d 372, 374 (1st Cir. 1973) (same); *Lawson v. United States*, 397 F. Supp. 370, 371 (N.D. Ga. 1975) (same); *United States v. Russo*, 358 F. Supp. 436, 438 (D.N.J. 1973); (same); *United States v. Summa*, 362 F. Supp. 1177, 1179 (D. Conn. 1972) (same). In addition, this Court recently held that guilty pleas can be reviewed via a writ of habeas corpus after it has concluded subsequently that the underlying activity is not criminal. *See Bousley v. United States*, 523 U.S. 614, 620 (1998) ("it would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner from relying on our decision in *Bailey* in support of his claim that his guilty plea was constitutionally invalid.").

agreement is "fatally and constitutionally tainted for lack of due process of law" where a subsequent Supreme Court decision has made clear that the activity for which he was convicted was not a crime. *United States v. Sawyer*, 74 F. Supp. 2d 88, 106 (D. Mass. 1999).[4] According to that court, to preclude attacking the plea agreement (or the analogous Consent Decree here) would be "a legal error of fundamental proportion." *Id.*

The court below took the opposite view of decisions by this Court which dramatically alter the validity of previously consented-to agreements. Rather than conclude that continuing to enforce an agreement where the underlying law has been reversed would be "a legal error of fundamental proportion," the court below concluded that it "fail[ed] to see how it has any effect on the validity of the decree." Pet. App. 12a. Under the Seventh Circuit's logic, the decision to enter into a plea agreement rather than litigate forever cuts off the ability to seek relief after this Court determines that the agreed-to conduct was not actually criminal. To resolve this split in authority, certiorari should be granted here.

II. The Decision Below Permits The Federal Government to Continue Regulating An Isolated Wetland In Contravention Of This Court's Reasoning in *SWANCC*.

The Seventh Circuit's decision allows the federal government to continue to regulate an isolated, non-navigable, intrastate wetland and seek over $4,000,000 in penalties from Petitioners via a Consent Decree which, according to *SWANCC*, the government lacked the authority to enter into in 1999 and certainly now lacks the authority to enforce. With this decision,

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4. The vacation of Sawyer's sentence was subsequently reversed by the First Circuit because, in the First Circuit's view, Sawyer was guilty of violating the statute even based on this Court's interpretation of the governing statute. *United States v. Sawyer*, 239 F.3d 31 (1st Cir. 2001). The First Circuit nonetheless assumed that a writ of coram nobis is available to vacate a criminal conviction based on a guilty plea which is premised on a fundamental error of law. *Id.* at 38.

the court below has joined a growing body of appellate courts, along with the government, which have refused to adhere to the Court's conclusion that "the text of [CWA § 404(a)] will not allow" the jurisdiction of the government to extend to waters that "are *not* adjacent to open water." *SWANCC*, 531 U.S. at 168.

A. The Decision Below Contradicts This Court's Prior Caselaw Interpreting CWA § 404(a)

This Court has explained repeatedly that the scope of the CWA, and therefore the government's authority to regulate pursuant to it, relies heavily on traditional concepts of navigation and what constitutes "navigable waters." CWA § 404(a), 33 U.S.C. § 1344(a), authorizes the ACOE to issue permits approving "the discharge of dredged or fill material into the navigable waters." Discharges not authorized by the ACOE are prohibited. CWA § 301(a), 33 U.S.C. § 1311(a). "Navigable waters" are defined as "waters of the United States." 33 U.S.C. § 1362(7). By regulation, the ACOE and the EPA have defined the scope of their jurisdiction over "waters of the United States" to include, among other things, certain types of wetlands. 33 C.F.R. § 328.3(a) (ACOE definition); 40 C.F.R. § 230.3(s) (essentially identical EPA definition).

In 1985, this Court decided *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), in which it upheld the government's jurisdiction over a wetland that was not itself navigable, but which physically abutted a navigable creek and therefore was "adjacent to a body of navigable water." *Id.* at 131. The government's jurisdiction was based upon that portion of the definition of "waters of the United States" now found at 33 C.F.R. § 328.3(a)(7) which encompasses adjacent wetlands. *See also* 33 C.F.R. § 328.3(c) (defining "adjacent" as "bordering, contiguous, or neighboring" and also including "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like"); 40 C.F.R. § 230.3(b) (same). In concluding that

this adjacent wetland acceptably fell within CWA § 404(a)'s definition of "waters of the United States," the Court specifically stated that it "d[id] not express any opinion" on the "question of the authority of the [government] to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." *Riverside Bayview Homes*, 474 U.S. at 131 n.8.

A separate portion of the definition of "waters of the United States" addresses "isolated" waters, including isolated wetlands. These are defined to include:

> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

33 C.F.R. § 328.3(a)(3).

In 1986, the year after *Riverside Bayview Homes*, the ACOE issued a "clarification" which expanded its jurisdiction under § 328.3(a)(3) over intrastate waters:

> (a) Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

(b) Which are or would be used as habitat by other migratory birds which cross state lines; or

(c) Which are or would be used as habitat for endangered species; or

(d) Used to irrigate crops sold in interstate commerce.

51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

This was the Migratory Bird Rule, issued without formal notice and comment, *see* 5 U.S.C. § 553, and never codified in the definition of "waters of the United States."

The Court revisited the issue of the breadth of the government's jurisdiction under these regulations two years ago in *SWANCC* in the context of a non-navigable, intrastate, isolated area of seasonal ponds which were periodically visited by migratory birds. There, this Court specifically invalidated 33 C.F.R. § 328.3(a)(3), as clarified by the Migratory Bird Rule, as exceeding the authority granted by Congress in CWA § 404(a). *SWANCC*, 531 U.S. at 174. While focusing on the Migratory Bird Rule, the Court's analysis demonstrates that it applies equally to all other types of non-navigable, intrastate, isolated waters, such as the isolated wetland at issue here. The Court explained that:

> It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes*. Indeed, we did not "express any opinion" on the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water. . . ." 474 U.S. at 131-132, n.8. In order to rule for [the ACOE] here, we would have to hold that the jurisdiction of the Corps extends to

> ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this.

SWANCC, 531 U.S. at 167-68.

Thus, the Court clearly stated that "the text of the statute will not allow" the government to assert jurisdiction over waters "that are *not* adjacent to open water," such as a wholly intrastate, isolated wetland not adjacent to navigable waterways or their tributaries, as is at issue here. *Id.* at 168. Congress's authority to enact the CWA stems from "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172. According to the Court, the ACOE shared that understanding prior to the 1986 passage of the Migratory Bird Rule. Before that time, the ACOE grounded its view of "waters of the United States" in traditional notions of navigation. The ACOE declared that "the determinative factor" in deciding whether it had jurisdiction to regulate a particular body of water was "the water body's capability of use by the public for purposes of transportation or commerce . . ." *Id.* at 168 (quoting 33 C.F.R. § 209.260(e)(1) (1974)).

The four Justices who dissented in *SWANCC* also clearly recognized and articulated that conclusion. According to the dissent, "[i]n its decision today, the Court draws a new jurisdictional line, one that invalidates the 1986 migratory bird regulation as well as the Corps' assertion of jurisdiction over all waters except for actually navigable waters, their tributaries and wetlands adjacent to each." *Id.* at 176 (Stevens, J., dissenting). The dissent explained that the decision limited the ACOE's jurisdiction to what the agency termed "Phase 1" and "Phase 2" waters, *i.e.*, navigable waters and their contiguous wetlands, and primary tributaries of navigable waters and their adjacent wetlands. *Id.* at 189 (Stevens, J., dissenting); *see also* 33 C.F.R. § 328.2(j) (1981) (defining "primary tributaries" as "the main stems of tributaries directly connecting to navigable

waters of the United States up to their headwaters and does not include any additional tributaries extending off of the main stems of these tributaries."). In doing so, it effectively "excise[d] from the scope of the [CWA]" so-called "Phase 3" waters which include "isolated waters [such] as intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters." *SWANCC*, 531 U.S. at 189 & n.14.

The CWA's legislative history underscores the conclusion of this Court that the government's jurisdiction is limited to those waters which could be used for navigation purposes in commerce and those waters that are tributaries or adjacent to such waters. According to conferees on the CWA, "navigable waters" are defined as:

> all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States. . . .

118 Cong. Rec. 33,699 (1972) (statement of Sen. Muskie, sponsor and floor manager of Senate version of CWA); *see also* 118 Cong. Rec. 33,756-57 (1972) (statement of Rep. Dingell) (defining "navigable waters" to mean "that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation.").

Therefore, the scope of the government's authority to regulate pursuant to the CWA is limited to waters which are part of a "continuing highway over which commerce" travels between the states. That is, Congress limited the government's

regulatory authority under the CWA to waters that are navigable, tributaries to such waters, and wetlands that are immediately adjacent to such waters.[5]

The effect of the Seventh Circuit's decision is to perpetuate the government's assertion of regulatory jurisdiction over the isolated wetland here in contravention of the Court's holding and reasoning in *SWANCC*. The district court clearly vacated its finding of adjacency and presumed correctly that this wetland is isolated, Pet. App. 22a, 27a, meaning that it is not "bordering, contiguous, or neighboring" "navigable waters." 33 C.F.R. § 328.3(c) (definition of "adjacent").[6] The *SWANCC* majority

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5. Perhaps to underscore this point, soon after the *SWANCC* decision, this Court vacated and remanded a judgment affirming a developer's conviction for unlawfully filling wetlands in light of *SWANCC*. There, the government had not invoked the Migratory Bird Rule to support its alleged jurisdiction, and the conviction left it unclear whether the subject wetland was isolated or adjacent. *Rapanos v. United States*, 533 U.S. 913 (2001). *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (GVR order is "potentially appropriate" when there is "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation. . . .").

Following remand, the district court dismissed the case because the wetlands were between eleven and twenty miles from the nearest navigable-in-fact waters and so "were not directly adjacent to navigable waters." *United States v. Rapanos*, 190 F. Supp.2d 1011, 1013-14 & 1017 (E.D. Mich. 2002). However, the Sixth Circuit has since reinstated the conviction, reasoning that *SWANCC* did not "restrict[] the Act's coverage to only wetlands directly abutting navigable water." *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003) (discussed *infra*).

6. The Seventh Circuit's digressions about adjacency, Pet. App. 10a-11a, draw no conclusions about the issue (nor could they as an appellate court, without an evidentiary hearing) and are completely belied by: (1) the district court's *vacatur* of its factual finding that the wetland is adjacent, Pet. App. 27a; (2) the uncontradicted evidence in the record;

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stated plainly that "the text of the statute does not allow" the government to assert jurisdiction over waters "that are *not* adjacent to open water." 531 U.S. at 168. As the dissent in *SWANCC* makes clear, this is a "new jurisdictional line" that "invalidates . . . the [government's] assertion of jurisdiction over all waters except for actually navigable waters, their tributaries and wetlands adjacent to each" and "excises . . . from the scope of the [CWA]" "isolated waters [such] as intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters." *Id.* at 176, 188 & n.14 (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.).

The isolated wetland here, by definition, is "*not* adjacent to open water" and "not contiguous or adjacent to navigable waters." Because this Court in *SWANCC* determined that such wetlands are beyond the scope of the government's jurisdiction based on the text of CWA § 404(a), the government lacked statutory authority when it brought an enforcement action against Petitioners regarding this wetland and subsequently entered into the Consent Decree. It certainly lacks the authority to continue to seek enforcement of the Consent Decree after *SWANCC*. The Seventh Circuit's decision must therefore be reversed.[7]

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and (3) the lack of any admission whatsoever by Petitioners in the Consent Decree itself that the wetland is "adjacent" or otherwise part of the "waters of the United States." In fact, according to the government's own allegations in its 1991 Administrative Compliance Order (which were rebutted by Petitioners' uncontradicted evidence), the wetland is "adjacent to an unnamed tributary to Dyer Ditch which flows north to Hart Ditch which flows north to the Little Calumet River, which is a navigable water of the United States." The court's thought that this might constitute "adjacency" when even the ACOE defines adjacent as "bordering, contiguous, or neighboring," 33 C.F.R. § 328.3(c), only further demonstrates the need for additional guidance from this Court in this confused area.

7. In reaching its conclusion, the Seventh Circuit relied heavily on its prior decision in *United States v. Krilich*, 303 F.3d 784 (Cont'd)

B. Appellate Courts Already Conflict About the Scope of the Government's CWA § 404(a) Jurisdiction After *SWANCC*

In scarcely two years, lower courts have already divided on several issues regarding how far the government's jurisdiction extends under CWA § 404(a), particularly with regard to its jurisdiction to regulate wetlands. *See, e.g., United States v. Rapanos*, 339 F.3d 447, 451 (6th Cir. 2003) ("Wetlands have presented one of the most difficult areas in which to determine the Clean Water Act's exact jurisdictional limitations."). The first is whether *SWANCC* simply invalidated the Migratory Bird Rule or whether its logic applies more broadly to invalidate any assertion of jurisdiction by the government over isolated wetlands under any portion of 33 C.F.R. § 328.3(a)(3). Because the district court vacated its finding that the wetland here is adjacent, Pet. App. 27a, that issue more directly affects this case. The second issue is closely-related to the first. Did *SWANCC* impact how far along the spectrum between adjacent wetlands and isolated wetlands the government's CWA § 404(a) jurisdiction extends? Rather than address the government's inability to continue regulating isolated wetlands, the government (and some courts) have tried to limit *SWANCC*'s application to isolated wetlands and then espouse an incredibly broad interpretation of what constitutes an adjacent wetland which is inconsistent with this Court's prior interpretations of CWA § 404(a) in *SWANCC* and *Riverside Bayview Homes*. *See, e.g., United States v. Interstate General Co.*, 2002

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(7th Cir. 2002), *cert. denied*, 123 S. Ct. 1782 (2003), which differs greatly from this case. In *Krilich*, the court concluded that *SWANCC* did not require modification of a CWA consent decree because: (1) the developer had "already agreed that the waters [at issue] were 'waters of the United States,'" *id.* at 791; and (2) the parties expressly agreed that the decree would interpret CWA § 404(a) to exclude isolated wetlands from the ACOE's jurisdiction, *id.* at 791. These dispositive admissions are missing in Petitioners' Consent Decree.

WL 1421411, *3 (4th Cir. July 2, 2002) (concluding that "the only clear change in law made by *SWANCC* is much more narrow," affecting only "the Corps's jurisdiction over an *isolated* intrastate body of water.").

Both issues have become critically important since *SWANCC* ended the government's heavy reliance on the Migratory Bird Rule as a basis for jurisdiction. *See* John D. Ostergren, *SWANCC in Duck Country: Will Court-Ordered Devolution Fill the Prairie Potholes?* 22 STAN. ENVTL. L.J. 381, 395 (2003) ("jurisdiction under the [Migratory Bird Rule] was so broad that the Corps had little incentive to distinguish between adjacent and isolated wetlands. After *SWANCC*, what remains of this rule, or of jurisdiction under Section 328.3(a)(3) generally, remains unclear and hotly contested."); *see also id.* at 393 ("By forcing greater reliance on adjacency as a basis for federal jurisdiction, *SWANCC* is balkanizing the circuits on these issues. A uniform position appears unlikely to emerge until the Supreme Court revisits adjacency jurisdiction.").

With regard to the government's ability to regulate isolated waters, including isolated wetlands, the Fifth Circuit has relied on *SWANCC* to conclude that such regulation is no longer permissible. *See Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001) ("a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water."). In addition, the Fourth Circuit, even before *SWANCC*, struck down 33 C.F.R. § 328.3(a)(3) because it had "nothing to do with navigable or interstate waters." *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997). Both these circuits, therefore, starkly conflict with the Seventh Circuit's decision below which permits continued regulation of an isolated wetland.

As for the "adjacency" question, courts have now stretched the definition of "adjacent" to "navigable waters" from the more familiar definition set forth in the regulations, *i.e.*, "bordering, contiguous, or neighboring," 33 C.F.R. § 328.3(c), to include

wetlands that drain waters that flow through man-made culverts, ditches, and drains, or that flow seasonally or intermittently, or that are many miles from navigable waters. For example, the Sixth Circuit recently reinstated a conviction for illegally filling an "adjacent" wetland that was "between eleven and twenty miles from the nearest navigable-in-fact water." *Rapanos*, 339 F.3d at 449. The Sixth Circuit concluded that *SWANCC* did not restrict "the Act's coverage to only wetlands directly abutting navigable water." *Id.* at 453. The court found a "significant nexus" between the wetlands and 'navigable waters,' via a drain that connected the wetland to a navigable river. *Id.*

Other courts, including the Second, Fourth, Ninth, and Eleventh Circuits, have concluded that, so long as a wetland is adjacent to some part of an entire tributary system that ultimately flows at some point into a navigable water, even roadside ditches are a sufficient basis for the government to assert jurisdiction. *See United States v. Deaton*, 332 F.3d 698, 710-12 (4th Cir. 2003); *see also Treacy v. Newdunn Associates, LLP*, 2003 U.S. App. LEXIS 18681, *23-26 (4th Cir. September 10, 2003) (applying *Deaton* and finding adjacency via a 2.4 mile series of natural and manmade ditches alongside interstate highways); *Headwaters v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (9th Cir. 2001) ("Even tributaries that flow intermittently are waters of the United States"); *United States v. TGR Corp.*, 171 F.3d 762, 764 (2d Cir. 1999) (non-navigable tributaries flowing into navigable streams are 'waters of the United States'"); *United States v. Eidson,* 108 F.3d 1336 (11th Cir. 1997) (manmade ditches and canals that flow intermittently into creek may be tributaries); *United States v. Lamplight Equestrian Ctr.*, 2002 U.S. Dist. LEXIS 3694, *27 (N.D. Ill. 2002) ("tributaries three times removed from navigable waters can fall under federal jurisdiction. Even where the distance from the tributary to the navigable water is significant, the quality of the tributary is still vital to the quality of the navigable waters.").

The Seventh Circuit's ruminations that the wetland here might be adjacent despite the district court's explicit *vacatur* of that determination fall squarely within these cases as well. Pet. App. 10a-12a. And they all seem clearly at odds with the ACOE's former definition of "primary tributaries" as being limited to "the main stems of tributaries directly connecting to navigable waters of the United States up to their headwaters and does not include any additional tributaries extending off of the main stems of these tributaries." 33 C.F.R. § 328.2(j) (1981).

A few courts have concluded that *SWANCC* addressed more than simply isolated wetlands and now has raised the threshold for the government to assert adjacency jurisdiction as well. *See, e.g., FD&P Enterp., Inc. v. U.S. Army Corps of Engineers*, 239 F. Supp.2d 509, 516 (D.N.J. 2003) (SWANCC requires that "a 'significant nexus' [to navigable waters] must constitute more than a mere 'hydrological connection.'"); *United States v. RGM Corp.*, 222 F. Supp.2d 780 (E.D. Va. 2002) (wetlands not contiguous to navigable river so jurisdiction not established based upon adjacency to navigable water).

The divergence of methodologies and results since *SWANCC* strongly suggests that this Court should provide additional guidance as to the limits of CWA § 404(a) jurisdiction.

C. Even the Regulating Agencies Have Expressed Confusion Over The Breadth Of Their Jurisdiction

Even the EPA and ACOE have expressed uncertainty over the impact of *SWANCC* on their regulatory jurisdiction. In their recent Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," the general counsels for their respective agencies stated that, "in light of *SWANCC*, it is uncertain whether there remains any basis for jurisdiction under the other rationales of § 328.(a)(3)(i)-(iii) over isolated, non-navigable, intrastate waters . . ." 68 Fed. Reg. 1991, 1997 (Jan. 15, 2003) (attaching Joint Memorandum of Robert E. Fabricant, General Counsel,

Environmental Protection Agency and Steven J. Morello, General Counsel, Department of the Army). The agencies also remarked that "the Supreme Court has not itself defined the term 'adjacent,' nor stated whether the basis for adjacency is geographic proximity or hydrology." *Id.* Notwithstanding this confusion, as is apparent in this case, the government still continues to assert the most narrow interpretation of *SWANCC* possible and the broadest vision of its regulatory authority in litigation. *See also In re Veldhuis*, 2002 EPA ALJ LEXIS 39, *177-78 (June 24, 2002) (jurisdictional connection to navigable waters "is not precluded by the distances or number of tributary connections involved, the intermittency of the connection, or the fact that some tributaries may have been of human construction.").

Federal regulators, the courts, and certainly the regulated entities such as Petitioners have struggled to interpret the scope of CWA § 404(a) jurisdiction ever since the *SWANCC* decision was handed down. They will continue to do so absent additional guidance from this Court. This petition for writ of certiorari should therefore be granted.

CONCLUSION

For all of the foregoing reasons, the petition should be granted.

Respectfully submitted,

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